

Jan 21, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHELE T.,

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

NO: 2:19-CV-304-FVS

ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. ECF No. 8. Having reviewed the parties' filings and the relevant legal precedent, the Court **DENIES** Defendant's Motion to Dismiss, ECF No. 8.

**BACKGROUND**

Plaintiff filed an application for disability benefits under Title II of the Social Security Act on September 12, 2017, which was denied initially and upon reconsideration by the Social Security Administration. *See* ECF No. 1 at 2; ECF

1 No. 9 at 3. On March 13, 2018, Plaintiff timely filed a request for a hearing before  
2 an Administrative Law Judge (“ALJ”). ECF No. 9 at Ex. 4. The address listed on  
3 the request for hearing was in Tennessee (“prior address”). On August 6, 2018, a  
4 Notice of Hearing was sent to Plaintiff at her prior address, advising her of the  
5 October 3, 2018 date set for the hearing. ECF No. 9 at Ex. 7. The notice was  
6 returned as undeliverable. ECF No. 9 at Ex. 8. On September 14, 2018, the  
7 hearing office unsuccessfully attempted to contact Plaintiff by telephone. ECF No.  
8 9 at Ex. 9. On September 19, 2018, a “Notice of Hearing – Important Reminder”  
9 was sent to Plaintiff at her prior address. ECF No. 9 at Ex. 10. Again, this notice  
10 was returned as undeliverable. ECF No. 9 at Ex. 11. Plaintiff submitted evidence,  
11 in the form of a declaration, that she notified the Social Security Administration of  
12 her new address in September 2018, and asked them to transfer her pending claim  
13 to Washington. ECF No. 11.

14 Plaintiff failed to appear at the hearing scheduled for October 3, 2018, and  
15 on October 15, 2018, a request to show cause for her failure to appear was sent to  
16 Plaintiff at her prior address. ECF No. 9 at Ex. 12. On October 17, the Social  
17 Security Office in Tennessee recorded Plaintiff’s change of address to her  
18 Washington address (“current address”). ECF No. 9 at Ex. 13. On November 9,  
19 2018, the ALJ dismissed Plaintiff’s request for a hearing finding there was no good  
20 cause for Plaintiff’s failure to appear at the time and place of hearing. ECF No. 9  
21 at Ex. 14. The dismissal was sent to Plaintiff’s prior address, and the notification

1 of dismissal was returned as undeliverable. ECF No. 9 at Exs. 14, 15.

2 Plaintiff appointed a representative on December 3, 2018. ECF No. 9 at Ex.  
3 17. In a letter dated April 1, 2019, Plaintiff requested that the Appeals Council  
4 review the ALJ's dismissal of her hearing request. ECF No. 9 at Ex. 18. On July  
5 26, 2019, the Appeals Council denied Plaintiff's request for review. ECF No. 9 at  
6 Ex. 19. On September 3, 2019, Plaintiff filed a civil action before this Court  
7 alleging that the Commissioner violated her due process rights by dismissing her  
8 request for hearing before the ALJ, thereby denying her a meaningful opportunity  
9 to be heard. ECF No. 1. Defendant filed a motion to dismiss for lack of subject  
10 matter jurisdiction, due to Plaintiff's failure to exhaust her administrative remedies.  
11 ECF No. 8. Plaintiff responds that the Court has jurisdiction to review the matter  
12 because she has asserted a colorable constitutional claim, namely, that her due  
13 process rights were violated by the Commissioner's failure to provide her with a  
14 meaningful opportunity to be heard. ECF No. 10.

## 15 DISCUSSION

16 Judicial review of the Commissioner's administrative decisions is governed  
17 by Section 405(g) of the Social Security Act, which reads in relevant part:

18  
19 Any individual, after any *final decision* of the Commissioner of Social  
20 Security *made after a hearing* to which he was a party, irrespective of  
21 the amount in controversy, may obtain a review of such decision by a  
civil action commenced within sixty days after the mailing to him of  
notice of such decision or within such further time as the Secretary may  
allow.

1 42 U.S.C. § 405(g) (emphasis added). Thus, pursuant to the Social Security Act,  
2 the Court has jurisdiction to review only a “‘final decision of the [Administration]  
3 made after a [statutorily mandated] hearing.’” *Dexter v. Colvin*, 731 F.3d 977, 980  
4 (9th Cir. 2013) (quoting *Califano v. Sanders*, 430 U.S. 99, 109 (1977)); 42 U.S.C.  
5 § 405(g). The meaning of the term “final decision” in Section 405(g) is left to the  
6 Commissioner “to flesh out by regulation.” *Weinberger v. Salfi*, 422 U.S. 749, 766  
7 (1975); *see also Mathews v. Eldridge*, 424 U.S. 319, 330 (1976) (“[U]nder s 405(g)  
8 the power to determine when finality has occurred ordinarily rests with the  
9 Secretary.”). That said, it is well-settled in the Ninth Circuit that the “final  
10 decision” of the Commissioner consists of two elements: “(1) the ‘jurisdictional’  
11 non-waivable requirement of presentment of the claim for benefits (presentment);  
12 and (2) the ‘waivable’ requirement of exhaustion of administrative remedies  
13 (exhaustion).” *See, e.g., Cassim v. Bowen*, 824 F.2d 791, 794 (9th Cir. 1987).

14 Exhaustion requires a claimant to proceed through all stages of the  
15 administrative appeals process. Under Social Security Administration regulations,  
16 an individual claiming entitlement to benefits first receives an initial determination.  
17 20 C.F.R. § 404.902. If dissatisfied with this determination, the claimant may ask  
18 for reconsideration. 20 C.F.R. § 404.907. If dissatisfied with the reconsidered  
19 determination, the claimant may request a hearing before an Administrative Law  
20 Judge (ALJ). 20 C.F.R. § 404.929. Finally, if the claimant is dissatisfied with the  
21 ALJ's hearing decision, the claimant may request that the Appeals Council review

1 the decision. 20 C.F.R. § 404.967. The Appeals Council may deny the request for  
2 review and allow the ALJ's decision to stand as the final decision of the  
3 Commissioner, or the Appeals Council may grant the request for review and issue  
4 its own decision. 20 C.F.R. § 404.981. The Appeals Council's decision, or the  
5 decision of the administrative law judge if the request for review is denied, is  
6 binding unless the party files an action in Federal district court or the decision is  
7 revised. *Id.*

8 Here, Defendant argues that Plaintiff failed to exhaust her administrative  
9 remedies because the ALJ dismissed Plaintiff's request for hearing due to  
10 Plaintiff's failure to appear. Thus, concludes Defendant, there is no judicially  
11 reviewable "final decision," and the Court lacks subject matter jurisdiction to  
12 review this action. ECF No. 8 at 4-5 (citing *Califano*, 430 U.S. at 109). Plaintiff  
13 responds that the Court has subject matter jurisdiction, as she has set out facts in  
14 her Complaint "giving rise to a colorable claim that her right to be heard was  
15 violated by the Commissioner's failure to send out the Notice of Hearing at least  
16 75 days before the hearing, as required under 20 C.F.R. § 404.938 and by the  
17 ALJ's failure to consider the factors set out in 20 C.F.R. § 404.936(e) before  
18 dismissing Plaintiff's claim." ECF No. 10 at 3. The parties do not appear to  
19 dispute that there has not been a judicially-reviewable final decision on Plaintiff's  
20 application; thus, the Court's jurisdiction to review the ALJ's dismissal of  
21 Plaintiff's request for hearing hinges on whether Plaintiff alleges a colorable

1 constitutional claim that her due process rights were violated by the ALJ's failure  
2 to follow Administration regulations and properly consider whether Plaintiff had  
3 good cause for failing to attend the hearing.

4 As noted by Plaintiff, a discretionary decision by the Administration that is  
5 not a final decision may be subject to an exception where the Commissioner's  
6 decision "is challenged on constitutional grounds." *Evans v. Chater*, 110 F.3d  
7 1480, 1482 (9th Cir. 1997) (citing *Califano*, 430 U.S. at 109); 42 U.S.C. § 405(g)).  
8 This "exception applies to any colorable constitutional claim of due process  
9 violation that implicates a due process right either to a meaningful opportunity to  
10 be heard or to seek reconsideration of an adverse benefits determination." *Udd v.*  
11 *Massanari*, 245 F.3d 1096, 1099 (9th Cir. 2001) (internal quotation marks and  
12 citation omitted). A "mere allegation of a due process violation is not a colorable  
13 constitutional claim." *Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir. 2008)  
14 (internal quotation marks and citation omitted). "Rather, the claim must be  
15 supported by facts sufficient to state a violation of substantive or procedural due  
16 process." *Id.* (internal quotation marks and citation omitted).

17 Due process requires that a claimant receive meaningful notice and an  
18 opportunity to be heard before his claim for disability benefits may be denied.  
19 *Mathews*, 424 U.S. at 333. However, under the applicable regulations, the ALJ  
20 may dismiss a request for a hearing if the claimant was provided notice, but failed  
21 to appear at the time and place of the hearing without good cause. 20 C.F.R. §

1 404.957(b)(1)(i). To provide notice, the SSA mails notice of the hearing to the  
2 claimant's last known address at least 75 days before the hearing. 20 C.F.R. §  
3 404.938(a). The claimant must acknowledge having received notice. 20 C.F.R. §  
4 404.938(c). If the claimant or claimant's representative does not acknowledge  
5 receipt of the notice of the hearing, the SSA will attempt to contact the claimant for  
6 an explanation. *Id.* If the claimant informs the SSA that he or she did not receive  
7 the notice of hearing, an amended notice will be sent. *Id.*

8 Here, it is uncontested that the Social Security Administration violated its  
9 own regulations by failing to send out the notice of hearing at least 75 days before  
10 the hearing.<sup>1</sup> *See* ECF No. 8 at 7 (Defendant acknowledges that notice was dated  
11

12  
13 <sup>1</sup> Defendant contends that Plaintiff does not “establish [] that this difference  
14 violated her due process rights” because “the Court should consider whether a  
15 notice was ‘reasonably calculated’ to inform [Plaintiff] of the hearing even when  
16 the agency overlooks specific regulatory requirements for the notice.” ECF No. 8  
17 at 7 (citing *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004)). However, as  
18 noted by Plaintiff, *Kahn* is inapplicable in this case because the agency in *Kahn*  
19 was specifically noted to have adhered to the statutorily imposed procedural  
20 requirements, whereas here “the Commissioner, by his own admission, failed to  
21 follow the Regulations when the Notice of Hearing was not sent out at least 75  
days before the hearing.” ECF No. 10 at 4-5. Moreover, as discussed in this order,

1 August 6, 2018, which “gave Plaintiff 61 days notice of the October [3], 2018  
2 hearing date”). It is further uncontested that the first notice of hearing sent to  
3 Plaintiff’s prior address on August 6, 2018, was returned as undeliverable; the  
4 Commissioner’s attempt to contact Plaintiff by phone on September 14, 2018 was  
5 unsuccessful; and the amended notice of hearing dated September 19, 2018, was  
6 sent to Plaintiff’s prior address and returned as undeliverable. *See* ECF No. 9.  
7 Moreover, after Plaintiff did not appear at the scheduled October 3, 2018 hearing, a  
8 request to show cause for her failure to appear, dated October 15, 2018, was sent to  
9 Plaintiff’s prior, incorrect, address. ECF No. 9 at Ex. 12. As noted in the ALJ’s  
10 dismissal order, Plaintiff did not respond to this order. ECF No. 9 at Ex. 14. Thus,  
11 the record indicates that at no point did Plaintiff acknowledge receipt of any  
12 attempts by the Commissioner to notify her of the scheduled hearing date, all of  
13 which had been sent to her prior address.

14 In addition, Plaintiff has submitted evidence that she called the Social  
15 Security Administration in September 2018 and asked to have her claim transferred  
16 to Washington. ECF No. 11. Of particular note, Defendant acknowledges that the  
17 Social Security Office in Tennessee recorded Plaintiff’s change of address to her  
18 Washington address on October 17, 2018; nonetheless, the November 9, 2018  
19 dismissal of Plaintiff’s request for hearing still was addressed to Plaintiff’s prior

20 \_\_\_\_\_  
21 it is unclear in this case whether Plaintiff received actual notice of her hearing  
sufficient to meet due process requirements.



1 Tennessee address, and the letter again was returned as undeliverable. ECF No. 9  
2 at 4.

3 In dismissing Plaintiff's hearing request, the ALJ generally "considered the  
4 factors set forth in 20 C.F.R. § 404.957(b)(2) and [found] there is no good cause  
5 for [Plaintiff's] failure to appear at the time and place of hearing." ECF No. 9 at  
6 Ex. 14. Defendant argues that

7 [s]ince Plaintiff failed to appear and then failed to respond to the  
8 October 15, 2018 order to show cause, the ALJ appropriately waited 10  
9 days before dismissing the hearing request in his November 10, 2018  
10 order. Although Plaintiff had changed her address with the agency by  
11 that time, this was only after she failed to respond to two months of  
12 notices from the ALJ. There was no regulatory requirement for the ALJ  
13 to find a showing of "good cause" for failure to appear simply because  
14 [Plaintiff] waited months to advise the agency that she had moved.

15 ECF No. 8 at 8 (internal citations omitted). However, the regulations specifically  
16 provide good cause for missing a deadline may exist when a claimant did not  
17 receive notice of a determination. 20 C.F.R. § 404.911(a), (b)(7). As discussed in  
18 detail previously, Plaintiff presents evidence that she did not receive the notices of  
19 hearing or the order to show cause, all of which were returned as undeliverable,  
20 and despite informing the Commissioner of her change of address, the order of  
21 dismissal was sent to her prior address. Moreover, it is undisputed that the  
Commissioner failed to send the notice of hearing 75 days before the scheduled  
hearing date, as required under Social Security regulations.

Because the ALJ failed to follow Administration regulations requiring him  
to determine whether Plaintiff had been notified that her hearing request could be

1 dismissed if she did not appear at the time and place of hearing, the Court  
2 concludes that Plaintiff has alleged a colorable constitutional violation implicating  
3 her right to a meaningful opportunity to be heard. *See, e.g., Dexter v. Colvin*, 731  
4 F.3d 977, 981–82 (9th Cir. 2013) (finding due process violation where ALJ failed  
5 to follow regulations while noting that not every failure would necessarily rise to  
6 that level); *see also Howard v. Heckler*, 661 F.Supp. 654, 656 (N.D. Ill. 1986)  
7 (“[I]t would be curious indeed if the [Commissioner] could foreclose judicial  
8 review, for whatever reason, by merely denying the claimant a hearing. This  
9 concern is heightened where, as here, the claimant alleges that the agency denied  
10 him a hearing in violation of its own regulations.”).

11 Therefore, the Court finds that Plaintiff is entitled to judicial review of her  
12 Title II application for benefits, despite the fact that no final agency decision has  
13 been issued by the Commissioner in this case. However, because no hearing before  
14 an ALJ has been held in this matter, and because no final determination on the  
15 merits of plaintiff's claims has been made at the administrative review level, this  
16 matter should be remanded to the Commissioner for further administrative  
17 proceedings in that regard.

18 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 19 1. Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction,  
20 **ECF No. 8**, is **DENIED**.

2. This matter is **REMANDED** to the Commissioner for an administrative hearing and consideration of Plaintiff's application for benefits on its merits.

3. Application for attorney fees may be filed by separate motion.

The District Court Clerk is directed to enter this Order and provide copies to counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

**DATED** January 21, 2020.

*s/ Rosanna Malouf Peterson*  
 ROSANNA MALOUF PETERSON  
 United States District Judge